

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 07-06

April 12, 2007

TO: All Division Heads, Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: Report of Quality Committee on FY 2006 Quality Reviews

One of my top priorities is that case processing in the Field be conducted consistent with the highest quality standards. Pursuant to this goal, the Field Quality Committee that was formed in FY 2004 continues to assess the quality of casehandling work in the Field and make recommendations based upon its findings. Over the past several years, the committee has provided a number of valuable recommendations to enhance quality and has continued its work during the current fiscal year. See OM Memoranda 06-91, 06-16, 05-57, 05-38 and 04-66.

The committee, composed of 8 Field managers and 2 representatives of the Division of Operations-Management, recently completed a careful review of issues identified in case processing during the FY 2006 quality review process. Based on this review, the Quality Committee prepared a report highlighting deficiencies and recommending some proposed solutions to prevent these issues from recurring. The Report of the Quality Committee on FY 2006 Quality Reviews is attached.

I strongly urge all Regional managers and supervisors to review this Report carefully and to implement the recommendations set forth in the report. Some of these issues occur more frequently than others and in some instances surfaced in only one or two quality reviews. Nevertheless, they are deserving of your careful attention and the report should be the subject matter of a training session with the professional staff. The committee members are listed on the attached report. They have my sincere thanks for a job well done.

/s/
R.M.

Attachments

cc: NLRBU
Release to the Public

MEMORANDUM GC 07-06

UNITED STATES GOVERNMENT
National Labor Relations Board
Memorandum



DATE: March 26, 2007

TO: Ronald Meisburg, General Counsel
John E. Higgins, Jr., Deputy General Counsel

THRU: Richard A. Siegel, Associate General Counsel
Anne G. Purcell, Deputy Associate General Counsel

FROM: FY 2007 Quality Committee (Rosemary Pye, RD, R-1; Rochelle Kentov, RD, R-12; Martha Kinard, RD, R-16; Robert W. Chester, RD, R-18; Karen Fernbach, RA, R-2; Claude T. Harrell, ARD, R-10; Dorothy D. Wilson, RA, R-26; Andrew Young, SCO, R-32; James G. Paulsen, AGC, Ops-Mgmt.; and Charles L. Posner, DAGC, Ops-Mgmt.)

SUBJECT: Quality Committee's Report on Common Casehandling Deficiencies
Uncovered in the FY 2006 Quality Review Process

High quality case processing continues to be a high priority of the General Counsel. Field case processing is evaluated annually by the Division of Operations-Management through its review of selected case files for each Regional Office. The Quality Committee, a field committee created by the General Counsel, has reviewed and discussed common problems uncovered during the FY 2006 quality review process. A summary of those problems is attached.

As in past years, the 2006 quality review process revealed much high quality case processing in all Regions, an achievement for which the Regions should be justifiably proud. However, the quality review process also revealed several recurring problems identified not only in FY 2006 but in previous fiscal years as well. This report highlights those problems and suggests best practices and other useful solutions that may prevent their recurrence.

In order to make the Committee's suggestions in this and other reports more readily available to the field, documents referred to in the Committee's Reports are being posted on the Operations page of Surfboard. After opening the Operations page of Surfboard, click on "Guidance/ Training." A new page will open that includes CATS templates for EAJA letters, a sample R-case check list, sample settlement agreement approval forms, and a PowerPoint presentation for use in training on this memo.

The Committee's report on the results of the FY 2006 quality reviews is divided into four sections: unfair labor practice cases, 10(j) issues, representation cases and compliance cases.

A. Unfair Labor Practice Cases

Issues were raised in six areas relating to the processing of C cases. These were: (1) length and organization of FIRs and other decisional documents; (2) incomplete affidavits and investigations; (3) circumstances and procedures for taking telephone affidavits; (4) problems with EAJA letters; (5) delays in following-up on deferred cases; and (6) cutting and pasting. As a key solution to avoiding these problems, the Committee also wishes to emphasize the critical role of supervisors in maintaining high quality.

1. Length and Organization of FIRs and Other Decisional Documents

The Committee noted that the use of the cut-and-paste function to include large segments of affidavits in final investigative reports (FIRs), agenda minutes, or other decisional documents leads to decisional documents that do not meet the need for succinctness and sound organization and analysis. While a judicious use of quotes is useful, there can be too much of a good thing. It is essential to organize and edit the decisional documents to promote sound decision making.

Based on their collective experience and the principles of the legal writing program, the Committee offers the following recommendations to make the decision makers “smart.” The basic principle is that the Board agent, who has the advantage of personal knowledge of the witnesses and a comprehensive understanding of the facts and law, must do the “heavy lifting” and convey a sense of the case to the reviewers and decision makers.¹

The following practices are suggested:

- a. Have an introductory overview and a recommendation of the overall case. With a particularly long case, subsidiary overviews of each section may be necessary. These overviews should not be just a bare recitation of the allegation with the recommendation without analysis, but should convey a real sense of the factors that are necessary to decide the case. This knowledge facilitates a reading of detailed facts.
- b. At the beginning of the document, list the affidavits, the documentary evidence, and position papers provided to help the decision maker understand the nature of the evidence and the cooperation of the parties.
- c. Have a good topic sentence at the beginning of each paragraph to provide guidance. Keep noting the significance of particular facts and analytic points in the development of the facts and analysis. It is vital to give frequent signals about the significance of each element of the case.
- d. When using lengthy quotes, introduce them by stating the purpose and content of the quote. Otherwise, readers tend to skim quotes.
- e. Because the reader does not have the same knowledge of the witnesses as the writer, use witness titles and positions frequently, not just when they are introduced. Also be consistent in the naming of witnesses by using their surnames. In appropriate cases, a cast of characters at the beginning of the decisional document is helpful.

¹ The terminology in quotes refers to the suggestion of Timothy Terrell of the legal writing program for the writer to do the “heavy lifting” to make the reader “smart.”

- f. For each conversation, provide the evidence that would be used in laying a foundation at trial – who, when, where, and what, repeating the language as much as possible for important points, rather than using conclusory language.
- g. For 8(a)(1) statements and other crucial information, indicate the page and line of the affidavit where it appears. Provide the specific language of 8(a)(1) allegations and other crucial statements.
- h. To the extent that witnesses corroborate each other, identify each corroborating witness but do not repeat each version. Use the charged party's version as an admission or the lead witness's version as the base and then indicate how the other witnesses' versions vary.
- i. Highlight the undisputed facts and then indicate the disputed additional facts, analyzing the probabilities of each version. Stress undisputed documentary evidence. If possible, begin the facts section with a statement that the facts are undisputed unless otherwise indicated.
- j. Acknowledge gaps. For example, explain instances where corroborating evidence has not been provided.
- k. Consider the needs of the particular case in choosing the organization of the decisional document. If timing is key, organize the decisional document chronologically and then expand on the more complex allegations, such as discharges. For other allegations, a topical outline may be more suitable.
- l. Organize the document like an ALJ decision: the facts, the positions of the parties, and the recommendation and analysis. It is essential to differentiate facts from analysis. Such a format also facilitates modification of the analysis. For complex or lengthy cases, consider following this format for each section of the document to have the analysis closely follow the relevant facts.
- m. In the analysis, refer specifically to evidence crucial to the recommendation. For example, with a discharge allegation, cite specific 8(a)(1) statements directed at the discriminatee, rather than simply reference the animus discussed above.
- n. Less is more. Before writing, outline the document to be sure all elements of each allegation are covered. After completing a draft, edit it to remove any unnecessary facts, which merely obscure the story, and to emphasize the critical facts and analytical conclusions.

Some things to **avoid** in the decisional document are:

- a. **Extensive cutting and pasting from affidavits:** Although a brief quote of the witness's version of a potential 8(a)(1) statement is desirable, extensive cutting and pasting from affidavits is not. This makes the document considerably longer and can cause the important facts and issues to get lost. The Board agent should evaluate and distill the important information without pasting lengthy sections of affidavits into the report.
- b. **Introducing new facts in the analysis section:** All facts should be included in the facts section and not introduced for the first time in the analysis.
- c. **Discussing all evidence presented by one party or witness and then discussing all evidence presented by another party or witness:** Organizing the evidence by witness or party requires the reader to flip back and forth in order to get a picture of the evidence

on a particular violation and is contrary to the purpose of the document, which is to assist in making a decision on whether certain conduct is a violation of the Act.

- d. **Excessive use of footnotes or placing important information in footnotes:** Footnotes are a distraction to the reader and should be used sparingly. If the information is important, it should be placed in the body of the document so it will not be overlooked.

2. Incomplete Affidavits and Investigations

Some of the affidavits reviewed in the quality reviews contained conclusory statements on important points, rather than probing for the pertinent facts. Examples included the failure to obtain evidence on supervisory status and to develop details on instances of disparity. When a witness relates an 8(a)(1) statement by a potential supervisor or agent, it is important to have the witness relay the statement as precisely as possible. For example, if the witness says a supervisor “threatened me because of the union,” the Board agent must probe to find out exactly what the supervisor said, rather than accepting the witness’s conclusion that the statement was a threat due to his union activity. In addition to capturing the specific statement, the agent must also obtain from that witness evidence regarding whether the potential supervisor or agent possessed Section 2(11) indicia or was an agent within the meaning of Section 2(13) of the Act. This is especially so when the statement was made by a first-line supervisor or a lead person because their status is often in dispute. If the agent waits to see if the individual’s status is an issue, a determination on the case will likely be delayed.

In some of the investigations examined in the quality reviews, important corroborative evidence was not sought. As noted in the Committee’s previous reports,² obtaining corroborative evidence is critical to ensure that the correct Regional determination is made and to enhance the likelihood that counsel for the General Counsel will prevail at trial. To determine if corroborative evidence might be available and to ensure the accuracy of the testimony, the agent should include the following for any important conversation: who else was present; where the conversation occurred; the approximate date; the time of day; and what was said, including how the conversation began. After getting that information, the agent should display a healthy curiosity and probe answers that are surprising, incomplete, or improbable. Where documentary evidence might be available to prove or disprove an issue, the agent should aggressively pursue obtaining that evidence using investigative subpoenas where necessary and appropriate.

3. Circumstances and Procedures for Taking Telephone Affidavits

The quality review process again revealed instances of the taking of telephone affidavits in Category 3 cases, with no documented reason for deviating from the General Counsel’s policy against such practice. The cases and situations in which it may be appropriate to use telephone affidavits in Category 3 cases are comprehensively covered in our memorandum on the FY 2005 Quality Reviews (OM 06-54). Succinctly stated, telephone affidavits are not to be used in Category 3 cases, except in limited circumstances, as outlined in OM 06-54 and the source materials cited therein, and not without both supervisory clearance and file documentation explaining the reason for the use of telephone affidavits. Usually, the same policy against

² See [OM 06-91](#) and [OM 06-16](#).

telephone affidavits is applicable to Category 2 cases. However, at times, due to budgetary constraints, casehandling cost savings instructions permit the use of telephone affidavits in Category 2 cases, unless the Regional Director determines that travel is essential to a quality investigation. (See OM 06-99.) These cost savings instructions do not extend to Category 3 cases. It should also be noted that absent extraordinary circumstances documented in the case file, telephone affidavits should not be taken when the witness is within the commuting area of the Regional office,

During the quality review process, we also identified four areas of concern regarding the procedures for taking telephone affidavits: (a) reviewing the prepared affidavit with the witness; (b) the timing and language of the oath; (c) the language of the jurat; and (d) the county and state specified in the affidavit. We recognize that in some instances the preferred procedures may not be followed when a witness is difficult to reach or uncooperative, but consistency is important in handling these matters.

a. Reviewing the Prepared Affidavit with the Witness

In some cases, agents are merely taking notes, then preparing the affidavit in final form and sending it to the witness. Instead of taking notes and preparing the affidavit later, a best practice in taking telephone affidavits is to prepare the affidavit during the initial telephone conversation with the affiant, read it to the affiant at that time to solicit immediate feedback as to whether facts were omitted or recorded inaccurately, and then send the prepared affidavit to the affiant.

b. Timing and Language of the Oath

The CHM notes only that the oath may be administered by telephone but does not specify *when* the oath should be administered. As a general rule when taking the telephone affidavit, the Board agent should administer the oath after the affiant has reviewed the affidavit and made any changes, but before he/she signs it. At that time, the Board agent should ask, “Do you solemnly swear/affirm that the affidavit you have just given is the truth, the whole truth and nothing but the truth, so help you God?” The date of the jurat is the date that the Board agent administers the oath and the affiant signs the affidavit. This practice, in fact, mirrors the process for face-to-face affidavits.

c. Language of the Jurat

To accurately reflect that the affidavit has been taken and sworn by telephone, Board agents should use the following jurat language for telephone affidavits: “Subscribed and Sworn to before the Board Agent by Telephone on (date),” followed by a signature line and the Board agent’s name.

d. County and State Specified on the Telephone Affidavit

Because the sworn statement is the affiant’s affidavit, the location of the affiant should be noted in the affidavit and not the location of the Board agent. Thus, the state and county noted in the affidavit should be that of the affiant and not the Board agent.

4. Problems with EAJA Letters

A frequently identified problem area during this past year's quality review process involved EAJA letters. There were instances where the Board agent's letter seeking the charged party's cooperation did not request to take affidavits. In other instances, the Board agent's letter did not explain that the refusal to allow the Board agent to obtain affidavits from charged party witnesses would constitute less than full cooperation in the investigation.

These problems with EAJA letters are not new. The memo discussing FY 2005 casehandling deficiencies identified these same problems. See OM 06-54. That memo recommended that Regions utilize the sample letters attached to OM 89-5 and attached four updated sample letters that Regions could utilize to ensure that EAJA letters contained appropriate language. To assist in avoiding further repetition of this problem, Regions should make templates containing appropriate EAJA language available to all Board agents. CATS templates of these letters, together with step by step instructions for making the templates available, are posted on the Operations Page on the Surfboard by clicking first on "Guidance/Training" and then on "EAJA Letter Templates." There is no reason why these problems should continue to occur given the past identification and discussion of the problems and the availability of samples containing language that conforms to Agency policy.

5. Delays in Following Up on Deferred Cases

The Quality Committee report attached to OM 06-54, dated March 30, 2006, outlined the Agency's increased efforts since September 11, 2002, to ensure that Regions regularly check the status of deferred cases at 90-day intervals and perform timely *Spielberg* reviews upon receipt of arbitration awards. Thus, it was quite surprising that this year's quality reviews revealed that deferral checks systematically were not being made as required in seven Regions. Although all Regions have systems for following up on deferred cases, it appears some Regions' systems rely too much on one person. Consequently, their systems break down if the individual responsible for deferral case work is out for an extended period or delays making deferral checks in order to complete what he or she perceives to be higher priority work.

It is General Counsel policy that deferral checks be made at 90-day intervals. Accordingly, whatever systems Regions have in place for following up on deferred cases must provide for the timely continuation of that work if the person sending out the letters, or who is responsible for following up after the letters have been sent, is absent from the office or is frequently diverted to perform other work.

Our CATS analysts have developed, and provided to most Regions, a query which not only draws data directly from CATS to show the date of the last deferral check but also calculates and displays the date when the next letter should be sent. The CATS analysts have recently developed another query that supplements this earlier query by adding the date of the latest "note" on a case. If Regions place information they learn following a deferral check into CATS notes (such as an allegation the grievance is no longer being processed, has been settled, or that an award has been issued), the query will allow anyone using it to easily discover which deferred cases need immediate further action. Those responsible for monitoring deferred cases

should place the query on their “desktop” and run it biweekly to obtain the information they need to ensure their Region is timely following up on its deferred cases.

6. Cutting and Pasting

The Committee noted several instances where Board agents appear to be cutting and pasting from one document to another without consideration or analysis. Several Final Investigative Reports contained only information that was cut and then pasted from affidavits and position statements and contained no analysis. In other cases, agents have cut and pasted language from one affidavit to another, from affidavits into EAJA letters and dismissal letters, and from parties’ briefs into the analysis section of RD Decisions.

The cut-and-paste function is an excellent tool and its appropriate use should be encouraged. However, Board agents must utilize this tool judiciously. For public documents, such as EAJA letters and dismissal letters, Board agents must be careful not to disclose confidential information contained in affidavits. When drafting RD decisions, cutting and pasting portions of a party’s brief without attribution creates the impression that the decision maker is not making an independent judgment. For decisional documents, cutting and pasting large portions of a position statement may unnecessarily lengthen the document and does not succinctly outline the arguments being advanced. More importantly, cutting and pasting is never a substitute for good legal analysis.

The Critical Role of the Supervisor In Maintaining High Quality Work

Responsibility for sound determinations and for quality work in all phases of casehandling is shared by the entire Regional Office staff, but first-line supervisors have a critical role in assuring that procedures and policies are fully followed and that highest standards are maintained.

The first-line supervisor occupies a unique position, providing immediate review of the investigation as a case is prepared for presentation to Regional Office decision makers. The supervisor is both sufficiently detached from a case to provide an objective view of evidence and issues, and close enough to be familiar with its details.

The supervisor is in the best position to assure the quality of many critical aspects of casehandling. For example, the supervisor can confirm that established policies are followed, such as timely initiation of the investigation or the use of proper EAJA language in correspondence soliciting the charge party’s response. The supervisor can also note problems in affidavits or identify overlooked issues. The supervisor also assures that all facts presented in the Final Investigation Report or other document used for making a Regional determination are fully supported by affidavits or other evidence. The supervisor provides critical perspective to even the most experienced and capable Board agent as well as direction and instruction to less experienced agents.

It is, therefore, imperative that supervisors thoroughly review investigative files and engage in early and regular discussions with investigating agents regarding the status of each case and what is required to complete the investigation.

B. 10(j) Issues

The quality review process for FY 2006 identified seven Regions in which Board agents failed to seek “just and proper” evidence during the investigation of a case identified as a potential 10(j) case. Obtaining “just and proper” evidence during the investigation of a case is critically important since it allows Regional management to discuss and resolve the 10(j) issue at the agenda on the underlying merits of the case. Moreover, it prevents a potential 10(j) case from being delayed while this evidence is obtained. Time is of the essence in the handling of 10(j) cases since the Agency must demonstrate to a district court that it moved quickly to investigate and litigate a case in which we are asking a district court to impose the extraordinary remedy of injunctive relief.

Regions should follow a best practice of maintaining a list of pending potential 10(j) cases. Regional management should then utilize this list to review regularly with supervisors the status of these investigations. In some Regions, Directors also hold status agendas on the investigation of potential 10(j) cases and give guidance to the Board agent on the steps necessary to complete the investigation of that case. Generally, obtaining “just and proper” evidence may only involve asking a few additional questions of witnesses as to the impact of the unfair labor practices. Thus, capturing this evidence during the investigation does not unduly prolong the investigation even if it is ultimately determined that the charge is without merit or that 10(j) relief is not warranted. Therefore, Board agents should routinely seek such evidence in all potential 10(j) cases.

The FY 2006 quality reviews also uncovered instances in which Regions failed to identify appropriate cases as ones in which 10(j) injunctive relief should be seriously considered. Specifically, Regions failed to identify the following cases as ones in which 10(j) injunctive relief should be evaluated: (1) a case in which an employer imposed an unlawful lockout on employees; (2) a case in which the employer had unlawfully withdrawn recognition from the union; and (3) a case involving 8(a)(1) protected, concerted activity discharges. Although Section 10(j) relief may not be warranted in all such cases, these cases are clearly among the types of cases in which injunctive relief should be among the remedies being seriously evaluated by the Region during the processing of the case.

Regions are strongly encouraged to train new Board agents on the handling of 10(j) cases. In addition, regular refresher training for all Board agents is a best practice that will ensure that the General Counsel’s 10(j) program remains active and viable. Training modules on identifying 10(j) cases and litigating 10(j) cases have been made available to the field. Because the Committee recognizes that 10(j) identification training has been held in the past, Regions may provide training for more seasoned agents by discussing the issuance of recent GC 10(j) authorization memoranda or district court 10(j) decisions. The Injunction Litigation Branch regularly sends out E-mail alerts to Directors on such cases and this information can then be utilized to conduct a refresher training session or just highlighted in a staff meeting. By following these best practices, Regions will ensure that they are fully supporting the high priority accorded by the General Counsel to the 10(j) program.

C. Representation Cases

The quality review process for FY 2006 revealed many successes and overall high quality in the processing of representation case matters. The process also identified several recurring problems.

Recurring problems were noted on the completeness of details in election agreements; failures to develop the record at hearings on disputed issues; failures to set forth factual summaries to support stipulations; and failures to clarify confusing positions and terminology. It is very important for case files to be self-contained and clear. Attention to detail during the investigation of the case and during reviews of the files will help to ensure that factual summaries support stipulations, positions and terminology are clear, election agreements are complete and record evidence is developed on disputed issues.

Another major recurring problem is the failure to properly document the files. Thorough but succinct file documentation is necessary and critical to allow anyone to pick up the file and be able to quickly determine the status of the case. This documentation allows others to easily continue with the processing of the case should the original agent be unavailable. Documentation allows any reviewing official to quickly ascertain what has been done and the rationale for taking such action and avoids the need to surmise why actions were, or were not, taken. Such documentation preserves the underlying facts and rationales for posterity and diminishes the need, if charges involving these parties are filed in the future, to speculate regarding important details. Finally, in some instances of particularly unusual or creative procedures, the documentation will serve as a teaching tool for cases raising the same or similar issues.

The review demonstrated an absence of, or incomplete, documentation of important issues. Examples include failure to document: efforts to advance the processing of petitions; the reasons for Regions' decisions on the resolution of issues such as challenged ballots and decisions to impound; checking of the adequacy of the showing of interest; the return of the showing of interest; the parties' positions on significant issues; and efforts to narrow the issues. Every file must be self-contained and documents in the file must show how the case progressed as well as the reasons certain actions were taken.

As the Committee previously recommended in OM 04-66 and OM 05-57, the representation case file should be complete and forms and checklists should be used to ensure that R-case files are in proper order, contain all necessary documents, and indicate that authorization cards have been returned prior to a case being closed. A sample checklist was attached to OM 05-57. Supervisors or managers must ensure that R-case files are self-contained, complete and fully documented before they are closed.

The Committee recommends that Regions verify that they have systems in place to address the recurring problems with file documentation, incomplete factual summaries to support stipulations, incomplete election agreements, self-contained files, failure to develop the record at hearings on disputed issues and failure to clarify confusing positions and terminology. It is recommended that supervisors pay special attention to these issues during their review of the investigative files and during regular discussions with the investigating agents regarding the

status of each case. Regions should periodically remind all employees of the need to address these issues and review the Regional policies and systems that exist to address these problems.

D. Compliance Cases

The quality reviews of compliance cases for FY 2006 revealed two areas of concern. The first area involved substantive deficiencies with settlement agreements including, for example, a failure to provide for interest payment on backpay and, in another case, an incomplete settlement stipulation that omitted the details of the payment plan and disbursement of monies.

In order to avoid these mistakes, the Committee recommends as a best practice that the Board agent who is negotiating a settlement agreement refer to a checklist of all potential compliance issues. For your convenience, the Committee has made available on the Operations' page of Surfboard several sample forms that are used by some Regions. The use of a checklist will ensure that our settlement agreements are accurate and complete and foster the Region's success in obtaining substantial compliance with its cases.

The other area of concern involves the failure to document all of the Regional determinations that were made during the compliance phase of case processing. These deficiencies included, for example, insufficient documentation of the basis for calculating backpay, the failure to contain copies in the file of backpay checks that were distributed to discriminatees, and the omission of file notes documenting the rationale for the Region's having obtained Operations' approval for backpay in excess of 100 percent or for backpay less than 80 percent.

Board agents should be reminded of the importance of documenting the determination of all compliance issues that are made by the Region during the processing of a case. Documentation may become crucial in considering whether or not a respondent has fully complied or whether or not a charging party or aggrieved party has a valid basis to appeal a Region's compliance determination.

Conclusion

The Committee hopes this analysis of FY 2006 quality reviews will assist in fostering high quality case processing in the field. The Committee also recommends that this memo be the subject of a professional training session in all Regional Offices. A PowerPoint presentation that may be used for that training is on the Operations - Guidance/Training page of the Surfboard.

Attachment

SUMMARY OF FY 2006 QUALITY REVIEWS

A. UNFAIR LABOR PRACTICE CASES

Affidavits Problems, Lack Of Corroboration and Scope of Investigation

- ✓ Some of the Region's affidavits contained conclusionary statements with no supporting facts and failed to develop key events raised by the charges. (3 Regions)
- ✓ Regions failed to contact corroborative witnesses or to take corroborative affidavits on key events raised by the charge, even though these events were substantially disputed by the charged party. (4 Regions)
- ✓ In one investigation, the affidavits of two separate witnesses contained the exact same wording regarding certain significant events raised by the charge.
- ✓ Files were missing affidavits that had been apparently removed for trial purposes and the evidentiary material had not been returned to the case file.
- ✓ Investigation of whether an employee engaged in concerted activity failed to consider whether the employee had invoked a right established in the parties' collective-bargaining agreement.
- ✓ Some affidavits did not have initials on each page or next to revisions.
- ✓ Some affidavits had incorrect attestation when dealing with phone versus face-to-face testimony.
- ✓ Affidavits failed to include relevant information and to ask relevant follow-up questions. (4 Regions)
- ✓ Agent failed to seek affidavit from important neutral witness, nor did agent request pertinent documents.
- ✓ Agent asked witness to act as a courier in taking unsigned affidavit to another witness.
- ✓ Agent failed to pursue obvious leads provided by evidence.
- ✓ A union was not informed about evidence that provided a basis to amend the charge or to file a new charge.
- ✓ The file lacked notes describing agent's attempts to obtain affidavits from corroborative witnesses, one of whom provided some relevant information, but declined to provide an affidavit.
- ✓ Deferred cases lacked pertinent sections of the relevant contracts. (2 Regions)
- ✓ Phone affidavits obtained in circumstances where face-to-face affidavit should have been sought (Category 3 cases and cases with 10(j) potential). (3 Regions)
- ✓ The file did not document approval to obtain evidence through phone affidavit.
- ✓ A Region failed to obtain affidavit from Charging Party in duty of fair representation case.
- ✓ Affidavits describing an individual as a supervisor failed to include facts to establish this conclusion. (2 Regions)
- ✓ An affidavit from an alleged discriminatee claimed disparate treatment, but statement failed to discuss any of the specifics.
- ✓ Although witness affidavit described incident when supervisor had thrown away union leaflets in presence of employees, affidavit did not contain details and Region did not investigate incident further.
- ✓ A Region failed to identify possible unlawful provision in company handbook.

Problems in Agenda Minutes and FIRs

- ✓ Agenda minutes were missing from the files in case(s). (2 Regions)
- ✓ FIR failed to raise or address a key allegation of the charge that the parties had reached a full agreement on the terms of a new contract and that the employer was refusing to execute the agreement.
- ✓ Several final investigative reports involved only cutting and pasting text from affidavits and position statements and did not contain any analysis of the issues presented or recommendations regarding whether complaint should be issued with respect to certain 8(a)(1) statements. (3 Regions)
- ✓ Agenda minute in a picketing case failed to consider whether 10(l) relief was needed to enjoin the union's unlawful conduct.
- ✓ Agenda outline inaccurately described coverage of grievance.

Docket Problems

- ✓ Docket Letter Problems: The Region's letters notifying parties of the docketing of a charge did not consistently contain e-mail addresses of Board agents, notification of 10(j) procedures, when appropriate, or a description of what constitutes full cooperation with the investigation. (1 Region) Language addressing access for persons with limited English proficiency and the Agency's service standards as outlined in OM 03-69 were not included in the Region's docket letters. (2 Regions)
- ✓ A review of the Region's files showed a significant number of cases in which the charge or amended charge was served more than 3 days after the filing of the charge. (2 Regions)
- ✓ Files failed to include I.O. contact sheets to assist in the investigation of a charge taken on I.O.
- ✓ Files contained unsigned affidavits of service.

Timeliness of Investigation and Unreasonable Deadlines

- ✓ Three weeks to a month elapsed before affidavit was taken or the charging party was contacted to provide evidence to support a Category 3, potential 10(j) case. (4 Regions)
- ✓ Six weeks passed before the charging party was requested to provide a lead affidavit to support its charge.
- ✓ Board agent gave a charged party inappropriately short time to respond to charge allegations. (2 Regions)
- ✓ A Region assigned a potential 10(j) case to agent on leave, resulting in significant delay in the initiation of the investigation.

EAJA Letters

- ✓ Letters to the charged party requesting their evidence did not conform to the GC's EAJA policy since it failed to request witnesses for affidavits and did not contain language about what constituted full cooperation. (7 Regions)
- ✓ EAJA letter contain full quotations from affidavits and overly long recitations of witnesses' testimony. (2 Regions)

- ✓ EAJA letters merely contained request for evidence instead of setting forth evidence and issues to which a response is requested, (2 Regions)
- ✓ EAJA letter improperly named employee to whom an 8(a)(1) statement was made. (2 Regions)
- ✓ EAJA letters did not contain sufficient detail. (2 Regions)

Collyer Follow-Up

- ✓ Regions failed to follow-up on a deferred case in the 90-day time frame set forth in the *Collyer* letter. (7 Regions)
- ✓ There was a substantial gap in time between the Region's receipt of an arbitration award in a deferral case and the Region's *Spielberg* review of that award.
- ✓ Status letter was not sent to all appropriate parties.

Complaint Inadequacies

- ✓ Complaint failed to plead the legal basis—the employer was engaged in bad faith bargaining--supporting the Region's conclusion that a lockout of unit employees was unlawful.
- ✓ Complaint was issued alleging a *Heinz* violation, even though the Region had already specifically approved a withdrawal of this allegation.

Wright Line Defense Issues

- ✓ A Region failed to follow-up and re-interview witnesses on the employer's asserted reasons for discharging the discriminatees.
- ✓ Region's investigation of a *Wright Line* defense to a discharge failed to seek evidence of disparate treatment.

File Documentation Issues

- ✓ Investigative file failed to contain any file notes documenting the processing of the case.
- ✓ File failed to contain any file note explaining how withdrawal of the charge was initiated.
- ✓ Telephone affidavits taken by a Board agent contained a signed jurat indicating that the affidavits were signed in the Board agent's presence when this was not the case.
- ✓ File needed more thorough documentation with regard to the Region's treatment of strike benefits as a deduction from gross back pay.
- ✓ File failed to contain the contract--evidence that was critical to outcome of case.
- ✓ File failed to memorialize reasons for taking phone rather than face-to-face affidavits. (2 Regions)
- ✓ File did not adequately document charged party's lack of cooperation.

Decision Document Issues

- ✓ Dismissal letter contained too much information from affidavit.

Settlement Agreement Issues

- ✓ Notice failed to contain plain language and contained duplicative paragraphs.

- ✓ Board agent failed to obtain initials on notices and other documents attached to settlements.
- ✓ Settlement of allegations sought at an inappropriately early stage of investigation.

CATS Issues

- ✓ Several case files reviewed showed that party participants were not fully updated in CATS and the file failed to contain an updated CATS service sheet.
- ✓ Several closed case reports in CATS failed to contain complete language needed in the “Other Remedies” section of the CCR.
- ✓ A Region had not entered CATS data covering a Board decision and subsequent compliance efforts.

B. 10(j) CASES

Obtaining Just and Proper Evidence

- ✓ In cases identified as having 10(j) potential, the Region failed to seek “just and proper” evidence during the investigation of the case. (7 Regions)

Failure to Consider Need for 10(j) Relief in Appropriate Cases

- ✓ In a case involving an unlawful lockout of all unit employees, the Region failed to raise, consider and document the Region’s consideration of whether 10(j) relief was warranted.
- ✓ In a case involving 8(a)(1) discharges, the Region failed to recognize and consider whether 10(j) relief would have been warranted.
- ✓ In a case involving a withdrawal of recognition, the file failed to contain any discussion of the appropriateness of Section 10(j) relief.
- ✓ In a number of potential 10(j) cases, Region did not consider 10(j) at the outset of the investigation. At conclusion of investigation, charged parties were provided unreasonably short deadlines to respond to issue of applicability of injunctive relief.

C. REPRESENTATION CASES

Case Processing Issues

- ✓ A Region failed to have the parties initial substantive changes to an election agreement.
- ✓ The file lacked entries evidencing check of adequacy of showing of interest.
- ✓ A Board agent failed to obtain all parties’ positions on significant issues.
- ✓ Resolutions of several post-election challenges were not explained in file.
- ✓ A file did not contain documentation of service of tally on party who was not present at count.
- ✓ A file lacked documentation of efforts to discuss and narrow issues relating to the unit and the identity of the employer.
- ✓ A file lacked documentation about efforts to advance processing of petition.
- ✓ A file lacked adequate documentation about the reasons for a Region’s decision to impound ballots.

- ✓ In two elections involving multiple polling places, notice of election did not include information about date, time and place where ballots would be co-mingled and counted.

Proper Role of Hearing Officer

- ✓ A pre-election Hearing Officer failed to develop an adequate record on the supervisory status of one individual.
- ✓ A Hearing Officer failed to clarify some confusing terminology regarding supervisory and nonsupervisory employees.
- ✓ A Hearing officer in a pre-election hearing failed to develop the record on the disputed issue regarding casual employees.
- ✓ Stipulations placed in the record by the Hearing Officer regarding supervisory status and the confidential employee status failed to contain a factual summary to support the stipulation. (3 Regions)
- ✓ A Hearing Officer in post-election hearing granted briefing rights at the start of the hearing even though the filing of such briefs is generally to be discouraged and the union had withdrawn its objections leaving only the challenged ballots for hearing.
- ✓ A Hearing Officer incorrectly stated that she had no authority to grant an extension of time to file briefs beyond 7 days from the close of the hearing.
- ✓ A Hearing Officer failed to notify parties about the availability of expedited transcript.
- ✓ A Hearing Officer failed to seek petitioner's position on an election in a unit different from that sought in the petition.
- ✓ In post-election hearing case, Hearing Officer made inaccurate statements about sanctions party receive for failing to provide subpoenaed documents.
- ✓ A Hearing Officer handling the first such assignment lacked adequate supervision.
- ✓ A Hearing Officer misstated the burden of establishing 2(5) labor organization status.

Return of Showing of Interest

- ✓ A Region was failing to return the showing of interest in a timely manner following the closing of a case.
- ✓ Files lack documentation concerning return of showing of interest. (2 Regions)

Tally of Ballots and Certification

- ✓ In completing the election tally, the Board agent failed to cross out line 11 indicating that the petitioner had not obtained a majority of the votes cast because of determinative challenges. Casehandling Manual Section 11340.8. (2 Regions)
- ✓ A Region failed to issue a certification of results for more than six months after the issuance of hearing officer's report on objections.

Decisions

- ✓ An RD Decision misstated the time period for filing a request for review.
- ✓ An RD Decision copied verbiage directly from a party's brief.
- ✓ An RD Decision contained a number of typos.
- ✓ A Region did not correctly apply the burden of establishing supervisory status.

D. COMPLIANCE CASES

Settlement Problems

- ✓ Approval of a settlement in compliance cases failed to contain a memo explaining how the amounts owed were calculated or whether these amounts reflected full payment as required by OM 04-66. (3 Regions)
- ✓ In seeking compliance with a court judgment, the trial attorney negotiated a settlement of the backpay for the discriminatees without payment of any interest on the backpay.
- ✓ A Region negotiated a settlement stipulation that failed to contain all the details of the settlement, including, in particular, the payment plan, the disbursement of money and other issues that made it difficult to obtain compliance with the agreement.
- ✓ In a formal settlement providing for reinstatement and backpay for a discriminatee, the Region failed to include a provision that the respondent would make the discriminatee whole for any additional loss of earnings caused by the failure to offer reinstatement within 14 days of the Board's order, resulting in a loss of over 4 months of earnings.

File Documentation Problems

- ✓ Compliance files failed to contain copies of the backpay checks distributed to the discriminatees.
- ✓ A closed compliance case failed to contain a completed closed case report.
- ✓ A Region failed to issue pre-closing letters in two compliance cases,
- ✓ Compliance file failed to contain evidence documenting the notice posting.
- ✓ A Region failed to obtain Operations' approval for backpay in excess of 100%. (2 Regions)
- ✓ A Region failed to obtain Operations' approval for accepting settlement with less than 80% backpay.
- ✓ A file did not contain sufficient documentation of some of Region's backpay calculations.

Case Processing Issues

- ✓ In one Region, the compliance files evidenced extensive periods of inactivity.
- ✓ A Notice to be posted omitted the names of some of the discriminatees.